Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-168

JOHN W. WHITEHEAD AND
ROBERT YOUNG ..... *Appellants*

v.

DARLENE WESTBROOK, CITY CLERK,
CITY OF FAYETTEVILLE, ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 (1)(d) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the following grounds:

1. The Supreme Court does not have jurisdiction to hear this direct appeal, because Ark. Stat. 19-704(f) is not a statute of general application and this case was not one required to be heard by a three-judge court.

2. The Supreme Court does not have jurisdiction to hear this direct appeal because appellants sought to restrain a local officer, not a state officer, from enforcing Ark. Stat. 19-704(f) and this case was not one required to be heard by a three-judge court.

STATEMENT OF THE CASE

A correct statement of the case appears at Pages 4-6 of appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

The questions presented by this appeal are set out at pages 3-4 of appellants' Jurisdictional Statement.

1. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR THIS DIRECT APPEAL, BECAUSE ARK. STAT. 19-704(f) IS NOT A STATUTE OF GENERAL APPLICATION AND THIS CASE WAS NOT ONE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT.

Appellants prosecute this direct appeal pursuant to 28 U.S.C. §1253. The Supreme Court has jurisdiction to review directly the lower Court's judgment only if the case was one required to be heard and determined by a three-judge court under 28 U.S.C. §2281. *Board of Regents of University of Texas System v. New Left Education Project*, 404 U.S. 541, 92 S. Ct. 652, 30 L. Ed. 2d 697 (1972); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 69 S. Ct. 606, 93 L. Ed. 741 (1949). If there is a jurisdictional barrier, it binds the Court even if not invoked by appellee. *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 59 S. Ct. 808, 83 L. Ed. 1242 (1939). The issue is not one of jurisdiction of the District Court as a Federal Court, but is whether a final hearing by three judges was required and hence, whether this Court has jurisdiction to hear the appeal. *Wilentz v. Sovereign Camp, W.O.W.*, 306 U.S. 573, 59 S. Ct. 709, 83 L. Ed. 994 (1939).

In order to give a three-judge court jurisdiction under 28 U.S.C. §2281, the suit must seek to have a state statute

declared unconstitutional and must seek to restrain the action of an officer of a state in the enforcement of such statute. *Ex parte Public National Bank*, 278 U.S. 101, 49 S. Ct. 43, 73 L. Ed. 202 (1928). The term "statute" does not include a state statute having only a local impact. *Board of Regents of University of Texas System v. New Left Education Project*, supra. Only a suit involving a statute of general application can invoke 28 U.S.C. §2281. A single judge, not a three-judge court, must hear the case where the statute is of only local import. *Moody v. Flowers*, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967); *Rorick v. Board of Commissioners*, supra; *Ex parte Public National Bank*, supra; *Ex parte Collins*, 277 U.S. 565, 48 S. Ct. 585, 72 L. Ed. 990 (1928).

The statute attacked by appellants, Ark. Stat. 19-704(f), is clearly not a statute of "general application," since the only cities affected thereby are those having the city manager form of government. The parties stipulated that ten cities in Arkansas have the city manager form of government, while 32 cities with a population greater than 5,000 are organized under the mayor council form of government. In *Starr v. Parks*, 345 F. Supp. 795, (D. Md. 1972), the Court ruled that a three-judge Federal Court was not required where the policy under attack affected only four of twenty-four political subdivisions of the state. In the case at bar, even a smaller percentage of the state's political subdivisions are affected by Ark. Stat. 19-704(f). The statute can scarcely be described as one of state-wide concern. The vast majority of municipal corporations in Arkansas could not be affected by any pronouncement that a Federal Court might make on the constitutionality of Ark. Stat. 19-704(f).

Arguably, some cities now having the mayor council form of government could change to the city manager form in the future, if the electors so voted. Such a possibility, however, does not make Ark. Stat. 19-704(f) a statute of general application. This is especially true, in view of the fact that Ark. Stat. 19-701 provides in part that only cities having a population of 2,500 or more, according to the last preceding United States Census, may organize under the city manager form of government.[1]

2. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR THIS DIRECT APPEAL BECAUSE APPELLANTS SOUGHT TO RESTRAIN A LOCAL OFFICER, NOT A STATE OFFICER, FROM ENFORCING ARK. STAT. 19-704(f) AND THIS CASE WAS NOT ONE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT.

A three-judge court may be invoked only when the suit is one to restrain state officers. *Wilentz v. Sovereign Camp, W.O.W.*, supra; *Ex parte Collins*, supra; *Ex parte Public National Bank*, supra. A "state officer" is one with authority to execute or administer a state-wide policy. *Stainback v. Mo Hock Ke Lok Po*, supra.

In the case at bar, appellants sought to restrain the City Clerk of the City of Fayetteville, Arkansas from enforcing Ark. Stat. 19-704(f). While the formal status of the official sued is not decisive, *Rorick v. Board of Commissioners of*

[1]Ark. Stat. Ann. 19-702 (Repl. 1968) provides in part:
"Any city within the State of Arkansas having a population of 2,500 or more, according to the last preceding United States Census, may become organized under the provisions of this Act (Sections 19-701 — 19-733) by proceeding as hereinafter provided. The form of government created by an organization under this Act is hereinafter called the management form of city government."

Everglades Drainage District, supra, the City Clerk in this case was not performing a state function within the meaning of 28 U.S.C. §2281, since the statute enforced did not embody a policy of state-wide concern. See *Spielman Motor Sales Company v. Dodge*, 295 U.S. 89, 55 S. Ct. 678, 79 L. Ed. 1322 (1935).

CONCLUSION

For the foregoing reasons, appellee moves that this appeal be dismissed. In the alternative, appellee moves that the Supreme Court vacate the judgment below and remand the case with instruction that the Court enter a fresh decree, so that appellants may be able, if they desire, to perfect a timely appeal to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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